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No. 07-440

IN THE
Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 23, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals correctly held that petitioner's Sixth Amendment right to counsel had not attached – even though petitioner was arrested and brought before a magistrate judge who informed him of the accusation against him, found probable cause that he had committed the offense of which he was accused, and committed him to jail pending trial or the posting of bail – because no prosecutor was involved in petitioner's arrest or appearance before the magistrate judge.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE ABA'S CRIMINAL JUSTICE STANDARD 5-6.1 REPRESENTS A BROAD-BASED CONSENSUS AND IS GROUNDED IN IMPORTANT POLICY CONSIDERATIONS	4
A. Criminal Justice Standard 5-6.1	5
B. The Standard's Rationales	8
II. THE ABA'S STANDARD 5-6.1 IS CONSISTENT WITH THE PRAGMATIC ASSESSMENT THIS COURT CONDUCTS IN DEFINING THE SIXTH AMENDMENT RIGHT TO COUNSEL	13
III. PETITIONER'S CASE ILLUSTRATES THE ADVANTAGES OF THE ABA'S APPROACH AND THE DANGERS OF THE FIFTH CIRCUIT COURT OF APPEALS' PROSECUTORIAL-INVOLVEMENT TEST	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 14, 15
Brewer v. *Williams*, 430 U.S. 387 (1977) 15
Castillo v. *Cameron County*, 238 F.3d 339 (5th Cir. 2001) 10
Coleman v. *Alabama*, 399 U.S. 1 (1970) 15
Estelle v. *Williams*, 425 U.S. 501 (1976) 2
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 15
Iowa v. *Tovar*, 541 U.S. 77 (2004) 11
Kirby v. *Illinois*, 406 U.S. 682 (1972) 14
Maine v. *Moulton*, 474 U.S. 159 (1985) 13, 14
McCoy v. *Court of Appeals of Wis., Dist. 1*, 486 U.S. 429 (1988) 14
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) ... 2
Patterson v. *Illinois*, 487 U.S. 285 (1988) 13, 16
Powell v. *Alabama*, 287 U.S. 45 (1932) 14
Rhodes v. *Chapman*, 452 U.S. 337 (1981) 10
Rompilla v. *Beard*, 545 U.S. 374 (2005) 2, 14
Wiggins v. *Smith*, 539 U.S. 510 (2003) 2, 14

STATUTES

Conn. Gen. Stat. § 54-1b 12
Mich. Comp. Laws Ann. § 801.51 10
N.Y. Crim. Proc. Law § 170.10 12
N.Y. Crim. Proc. Law § 180.10 12
Wis. Stat. Ann. § 970.02 12

RULES

Ariz. R. Crim. P. 6.1 12
Del. Super. Ct. Crim. R 44 12
Fed. R. Crim. P. 44 12
Fla. R. Crim. P. 3.130 12
Mass. R. Crim. P. 8 12

TABLE OF AUTHORITIES – continued

	Page
Me. R. Crim. P. 5C	12
N.D. Ct. R. Crim. P. 44	12
Pa. R. Crim. P. 122	12
Wash. Super. Ct. Crim. R. 3.1	12
W. Va. R. Crim. P. 44	12
CODE	
Cal. Penal Code § 859	12
D.C. Code § 23-1322	12
SCHOLARLY AUTHORITIES	
Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974)	6
Tom C. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 Notre Dame L. Rev. 429 (1972)	6
Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719 (2002)	9, 10
Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. Ill. L. Rev. 1 (1998)	9
OTHER AUTHORITIES	
ABA, *Annual Report* (1964)	6
ABA Criminal Justice Section, *Report to the House of Delegates* (Aug. 1998)	8, 11
ABA Mission and Association Goals, http://www.abanet.org/about/goals.html	2

TABLE OF AUTHORITIES – continued

Page

ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services* (Approved Draft 1968) 5, 6, 7

ABA, *Standards for Criminal Justice, Providing Defense Services* (2d ed. 1980) .. 8, 9

ABA, *Standards for Criminal Justice, Providing Defense Services* (3d ed. 1992) .. 5, 12

Michael Higgins, *Cook Inmates Bunking in Shifts; Move Eliminates Cots on Floor, but Some Say Crowding Remains*, Chi. Trib., Dec. 2, 2007 10

U.S. Dep't of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates*, http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf (last visited Jan. 22, 2008) 11

U.S. Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0302.pdf (last visited Jan. 22, 2008) 14

U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002*, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf (last visited Jan. 22, 2008) 14, 15

U.S. Dep't of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2006*, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf (last visited Jan. 22, 2008). 10, 11

TABLE OF AUTHORITIES – continued

Page

U.S. Dep't of Justice, Nat'l Inst. of Justice, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* (The URSA Institute, Aug. 1984)..... 9, 11

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully requests that, in considering when the Sixth Amendment right to counsel attaches, the Court reject the Fifth Circuit's prosecutorial-involvement test and, instead, consider the broad-based consensus views and important policy recommendations that are embodied in Standard 5-6.1 of the ABA's Standards for Criminal Justice.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2] The ABA's mission "is to be the national representative of the legal profession, serving the

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored any part of this brief, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

public and the profession by promoting justice, professional excellence and respect for the law."[3]

Since its inception, and as one of the cornerstones of its mission, the ABA has actively promoted the goal of ensuring that all indigent criminal defendants have appointed counsel. The ABA's Goal II is "[t]o promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."[4]

One of the most prominent efforts of the ABA toward meaningful access to legal representation has been its Standards for Criminal Justice. The ABA has developed, refined, and approved these Standards over the last forty years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wide and diverse membership of the ABA. These Standards have frequently been referred to, and adopted, by courts, legislatures, and executive branch law enforcement agencies. This Court in particular has repeatedly considered these Standards in determining the proper balance of individual rights and societal interests in the criminal justice system, including in the context of the Sixth Amendment right to counsel. See, *e.g.*, *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

The ABA Standards do not purport to set forth interpretive conclusions or opinions as to the

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[3] ABA Mission and Association Goals, http://www.abanet.org/about/goals.html.

[4] *Id.*

requirements of the Constitution generally or the Sixth Amendment specifically. They do, however, represent the considered, consensus views of prosecutors, defenders and judges, and constitute a realistic and balanced approach to criminal law enforcement that has proven effective over time. As relevant to this case, and contrary to the Fifth Circuit's prosecutorial-involvement test, the Standards recommend involvement of defense counsel at the earliest stages of criminal proceedings against an indigent defendant.

SUMMARY OF ARGUMENT

For four decades, the ABA has adhered to the position that counsel should be provided to an indigent criminal defendant as soon as feasible after custody begins, formal charges are filed, *or* the accused appears before a committing magistrate, whichever is earliest. This position is presented in Standard 5-6.1 of the ABA's Standards for Criminal Justice. The ABA's Standards represent the consensus views of experienced criminal adjudicators and practitioners, and have informed this Court's constitutional analysis, including its interpretation of the Sixth Amendment.

This Court's cases, as well as Standard 5-6.1, recognize that timely participation by counsel protects individual liberty and promotes the fair and efficient administration of justice. Competent counsel can promptly move for the dismissal of unfounded charges, preserve evidence vital to later stages of proceedings, and secure pretrial release or favorable bail conditions for the accused. The failure to appoint counsel at the early stages may result in unnecessary incarceration and avoidable prosecutions; it may also deny indigent defendants

crucial protections and, in so doing, perpetuate discrimination between impecunious defendants and those of means.

Petitioner's plight illustrates the soundness of ABA Criminal Justice Standard 5-6.1 and the peril of the court of appeals' approach. Petitioner was innocent of the charged offense from the start. Had a competent attorney assisted him at or after his initial appearance, petitioner may well have permanently regained his liberty much earlier. Instead, he was indicted by a grand jury, rearrested, incarcerated and transferred to a different jail because of overcrowding. He was not finally cleared of charges until nine months after his initial arrest. The failure to appoint counsel in response to petitioner's early requests may have caused not only an unnecessary loss of liberty for petitioner, but an equally unnecessary expenditure of the state's limited judicial and penological resources.

ARGUMENT

I. THE ABA'S CRIMINAL JUSTICE STAN-DARD 5-6.1 REPRESENTS A BROAD-BASED CONSENSUS AND IS GROUNDED IN IMPORTANT POLICY CONSIDER-ATIONS.

While, as petitioner argues, this Court's precedents guide the proper resolution to the question presented in this case, the ABA's Criminal Justice Standard 5-6.1 provides additional reliable guidance regarding the question of when the right to counsel should be deemed to attach. Forged over the course of several decades by the most prominent authorities in the field and sharpened by the views of diverse interest groups, Standard 5-6.1 retains at its core the principle that the accused should have access to counsel from the very initial stages of criminal

proceedings. This longstanding position reflects policy considerations critical to the functioning of the criminal justice system.

A. Criminal Justice Standard 5-6.1

For the last forty years, the ABA has maintained a consistent view on the issue at the heart of this case – that indigent criminal defendants should be provided with competent counsel at the earliest possible stage of criminal proceedings, and certainly no later than the accused's initial appearance before a judicial officer. This policy is currently set forth in Standard 5-6.1 of the ABA's *Standards for Criminal Justice, Providing Defense Services* 5-6.1 (3d ed. 1992) (hereinafter "Standard 5-6.1"). Entitled "Initial provision of counsel," it states in relevant part:

> Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. *Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.*

Standard 5-6.1 (emphasis added). Although the Criminal Justice Standards have been revised twice, the ABA has never wavered from the core principle expressed in Standard 5-6.1 or from the basic rationale underlying it – that "representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services* 3 (Approved Draft 1968).

The initial version of Standard 5-6.1 was a product of the ABA's commitment almost a half-century ago to "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" – the development of nonmandatory standards that could be used to "improv[e] the fairness, efficiency and effectiveness of criminal justice in the state and federal courts." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-52 (1974); ABA, *Annual Report* 422 (1964).[5] Hundreds of professionals from all over the country and representing every aspect of the criminal justice system participated in a rigorous process of consultation and review that ultimately yielded "a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Burger, *Introduction: The ABA Standards for Criminal Justice, supra*, at 251-52.

The predecessor to Standard 5-6.1, which was born of this elaborate effort, expressed the ABA's view that counsel should be provided to the accused "as soon as is feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest." ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services* § 5.1. (Approved Draft 1968). This position was not novel even in 1968, but rather reflected an already

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[5] *See also* Tom C. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 Notre Dame L. Rev. 429, 431 (1972) (noting the "enormity of the undertaking" and the "scholarly and high professional quality of the Standards themselves").

existing "consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical aspect of providing representation that is truly valuable and effective." *Id.* § 5.1 cmt. (internal citation omitted). Indeed, other standards adopted by the ABA in the early 1960s had similarly "emphasized the importance of early appointment." *Id.*

At no point did Standard 5.1's drafters indicate – nor has the ABA since suggested – that "the importance of early appointment" depended on whether a prosecutor was at that moment involved in the case. *Id.* Early representation was instead deemed advisable for two reasons independent of the particular prosecutor's role. First, the early assistance of counsel would protect "the immediate liberty of the accused and his opportunity to assist in the preparation of his defense," both of which "are at stake" throughout the initial stages of criminal proceedings. *Id.* Second, involving defense attorneys from the start would advance the efficient administration of justice by reducing the risk of wasteful prosecutions. "Representation at the earliest opportunity," the Commentary explained, "is essential to forestall the institution of unfounded proceedings through effective use of the preliminary examination and other screening devices." *Id.*

The ABA's policy, which reflects this dual rationale, remains the same today as it was four decades ago: all defendants should be provided with the assistance of counsel at the earliest possible stage of criminal proceedings, and certainly no later than the initial appearance before a magistrate where their liberty is

at stake.[6] This position is grounded in compelling policy considerations and accords with the rationale underlying this Court's right-to-counsel precedents.

B. The Standard's Rationales

Standard 5-6.1 reflects the ABA's longstanding recognition that the early assistance of counsel is beneficial both to the individual defendant and to society at large. One of the principal aims of Standard 5-6.1 has always been to safeguard the rights of the accused. The ABA recognized from the outset, and researchers have since confirmed, that the presence of counsel at the very earliest stages of a criminal proceeding protects "both the immediate liberty of the accused and his opportunity to assist in the preparation of his defense." *Standards Relating to the Provision of Defense Services* § 5.1 cmt. (Approved Draft 1968). Counsel can immediately interview crucial witnesses while key events are still fresh in their minds and before they become difficult to locate. ABA *Standards for Criminal Justice, Providing Defense Services* § 5-5.1 cmt. (2d ed. 1980). If the accused remains incarcerated, moreover, counsel will be able "to marshal facts in support" of pretrial release. *Id.* Counsel's intervention "can also

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[6] In 1998, the ABA House of Delegates reaffirmed that counsel should be provided as early as possible when it approved a resolution recommending: (1) that all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance where bail is set; and (2) that adequate resources be provided to ensure the recommended level of representation. An accompanying report emphasized that the resolution was designed to remedy the "specific issues" of "fair representation of the poor and unnecessary prison overcrowding." ABA Criminal Justice Section, *Report to the House of Delegates* 3 (Aug. 1998). The resolution thus constituted "an important and necessary complement" to Standard 5-6.1. *Id.*

sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts." *Id.*; see also *Standards for Criminal Justice, Providing Defense Services* 5-6.1 cmt. (3d ed. 1992).

Subsequent studies, including those conducted in the bail-hearing context, demonstrate the real-world foundations of Standard 5-6.1. These studies confirm what the ABA has long known from collective experience – that defense counsel's prompt entrance into the case protects both the immediate liberty interest and subsequent trial rights of the accused. For instance, one study funded by the National Institute of Justice found that early representation by appointed counsel improved the accuracy of bail setting and the early release of defendants without danger to the public or to the attorney-client relationship. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* 361-65 (The URSA Institute, Aug. 1984) ("*Field Test*"); see also Douglas L. Colbert, *Thirty-Five Years After* Gideon: *The Illusory Right to Counsel at Bail Proceedings*, 1998 U. Ill. L. Rev. 1 (1998) (arguing that the absence of counsel at the bail hearing negatively affects the trust relationship between client and attorney, the crucial initial investigation of the case, and the preparation for trial); Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719 (2002).[7]

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[7] The latter study was conducted by the Baltimore City Lawyers at Bail Project, which provided legal representation to "nearly 4,000 lower-income defendants accused of nonviolent offenses" at the initial bail hearing. Colbert, *supra*, at 1720. It

Early participation by defense counsel addresses another concern underlying Standard 5-6.1: promoting the efficient administration of justice. Appointed counsel can play a significant role in reducing the burden on congested court dockets and overcrowded jails. Burgeoning prison populations, it is widely recognized, constitute a serious and persistent problem across the nation.[8] What is more, well over half of the inmates of local jails are those who have not been convicted of the crime with which they are charged, but are instead incarcerated awaiting arraignment, revocation, or trial. U.S. Dep't of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2006*, at 6, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf (last visited Jan. 22,

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found that indigent defendants represented by counsel at their bail hearing were over two-and-a-half times as likely as unrepresented defendants with similar characteristics to be released on their own recognizance, and two-and-a-half times as likely to obtain a reduction of bail initially set following arrest. *Id.* at 1752-56.

[8] For example, a recent study by the Bureau of Justice Statistics indicated that "local jails nationwide operated at an average of 94% of rated capacity," meaning that some "exceeded their capacity." U.S. Dep't of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2006*, at 7, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf (last visited Jan. 22, 2008). At least one state, Michigan, has a "County Jail Overcrowding Emergency Act," which allows sheriffs to defer the admission of certain offenders, among other emergency measures. Mich. Comp. Laws Ann. § 801.51 *et seq.*, as amended. In other states, jails have operated – and in some cases continue to operate – under consent decrees entered as a result of overcrowding complaints. *See, e.g., Rhodes* v. *Chapman*, 452 U.S. 337, 354 n.1 (1981) (Brennan, J., concurring in judgment); *Castillo* v. *Cameron County*, 238 F.3d 339 (5th Cir. 2001); Michael Higgins, *Cook Inmates Bunking in Shifts; Move Eliminates Cots on Floor, but Some Say Crowding Remains*, Chi. Trib., Dec. 2, 2007, at C4.

2008); see also U.S. Dep't of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates, 2002*, at 2, http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf (last visited Jan. 22, 2008). Early representation by counsel makes it possible to "quickly identify individuals who are eligible for pretrial release, thereby freeing limited jail space for those who require pretrial detention." ABA Criminal Justice Section, *Report to the House of Delegates* 1 (Aug. 1998). It also

> allow[s] immediate identification of charges that are inappropriate for criminal prosecution, permitting the criminal justice system to devote its limited resources to more serious cases. With lawyers involved at the initial court proceeding, many cases also would be resolved much sooner – in days, rather than weeks or months.

Id. (footnote omitted). Other reliable studies confirm the ABA's conclusion. See *Field Test* at 361-65 (finding that early representation will benefit the public fisc by, among other things, significantly reducing case-processing time and the overall number of cases in the system at one time). As this Court has previously noted, efficiency-based factors of this sort are germane to the analysis of the Sixth Amendment right to counsel. See *Iowa* v. *Tovar*, 541 U.S. 77, 93 (2004) (rejecting rule requiring provision of detailed warning concerning waiver of Sixth Amendment right to counsel in part because the rule could impede "the prompt disposition of the case" and waste the resources of the state or the defendant).

That Standard 5-6.1 helps to advance both efficiency and liberty interests is further demonstrated by the choice of many jurisdictions to adopt a similar, if not identical, policy in their criminal codes, procedural rules, or rules of court.

See, *e.g.*, Wash Super. Ct. Crim. R. 3.1(b)(1) (court rule reciting Standard 5-6.1 verbatim); Ariz. R. Crim. P. 6.1(a) (timing requirement analogous to Standard 5-6.1). The federal government, the District of Columbia, and at least eight other states – California, Connecticut, Delaware, Florida, Massachusetts, North Dakota, West Virginia, and Wisconsin – guarantee the assistance of counsel at bail hearings. See Fed. R. Crim. P. 44(a); D.C. Code § 23-1322; Cal. Penal Code § 859; Conn. Gen. Stat. §54-1b; Del. Super. Ct. Crim. R. 44; Fla. R. Crim. P. 3.130(c)(1); Mass. R. Crim. P. 8; N.D. Ct. R. Crim. P. 44; W. Va. R. Crim. P. 44; Wis. Stat. Ann. § 970.02. *Amicus*'s research also indicates that, with some variations by locality, many other states require that defendants be provided access to counsel beginning at or shortly after their initial appearance. See, *e.g.*, Me. R. Crim. P. 5C; N.Y. Crim. Proc. Law §§ 170.10, 180.10; Pa. R. Crim. P. 122 & cmt. These rules reveal that legislatures and courts nationwide understand "the importance of providing counsel . . . at the earliest possible time after arrest." See Fed. R. Crim. P. 44, advisory comm. note.

Finally, and perhaps most importantly, Standard 5-6.1 helps to reduce discrimination on the basis of economic status. See *Standards for Criminal Justice, Providing Defense Services* 5-6.1 cmt. So long as indigent defendants are not "provided counsel at the earliest possible time, discrimination occurs between the poor defendant and the defendant of financial means." *Id.* Only those of means are "able to afford counsel," and will accordingly have access to "legal representation well before formal commencement of adversary proceedings." *Id.* Standard 5-6.1 seeks to eliminate this disparity by "provid[ing] for the indigent accused similar representation opportuni-

ties." *Id.* For this reason, Standard 5-6.1 remains central to the mission of the ABA and advances a principal tenet of the judicial system: equal justice under the law.

II. THE ABA'S STANDARD 5-6.1 IS CONSIS-TENT WITH THE PRAGMATIC ASSESS-MENT THIS COURT CONDUCTS IN DE-FINING THE SIXTH AMENDMENT RIGHT TO COUNSEL.

Standard 5-6.1 represents the profession's considered judgment that defense counsel should participate from the earliest possible stages of the proceedings – even those stages as to which this Court has not yet recognized a Sixth Amendment right to counsel. See Standard 5-6.1 cmt. Standard 5-6.1 is relevant to the Court's current Sixth Amendment analysis for at least three reasons.

First, this Court has undertaken a "pragmatic assessment" in determining the scope of the Sixth Amendment right to counsel. See *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988). The Court evaluates "the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Id.*; see also *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985) (noting the Court's "[r]ecogni[tion] that the right to the assistance of counsel is shaped by the need for the assistance of counsel"). Standard 5-6.1 speaks directly to this inquiry, representing the considered assessment of the bench and bar that the assistance of counsel during the early stages of a criminal case is, as a practical matter, vital. This unwavering "policy prescription[] of the legal profession" should be considered in defining the scope and nature of the right to counsel, which "has historically been an evolving concept" responsive to the contributions and views of the profession. See *Argersinger* v. *Hamlin*,

407 U.S. 25, 44 (1972) (Burger, C.J., concurring in the result).[9]

Second, Standard 5-6.1 is consistent with the rationale underlying this Court's Sixth Amendment precedents in point. This Court has long acknowledged that for many defendants the period from "their arraignment until the beginning of their trial" will be "the most critical" in the entire proceedings. *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932); see also *Kirby* v. *Illinois*, 406 U.S. 682, 688-89 n.6 (1972) (plurality opinion) (quoting this aspect of *Powell* with approval). And because "depriv[ing] a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself," the Court has likewise "recognized that the assistance of counsel cannot be limited to participation in a trial." *Moulton*, 474 U.S. at 170. This principle applies with even greater force in the present era, when the overwhelming majority of criminal cases are resolved by way of guilty pleas and thus never reach the trial stage.[10]

Third, this Court has repeatedly expressed the very concerns that animated the drafters of the initial

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[9] This Court has repeatedly noted its regard for the ABA's Criminal Justice Standards by citing and relying on them in the Sixth Amendment context. *See, e.g.*, *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 436 n.8 (1988). The ABA submits that Standard 5-6.1 should be given similar consideration.

[10] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, at 2, http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0302.pdf (96% of convicted federal defendants pleaded guilty in 2003) (last visited Jan. 22, 2008); U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002*, at 1, http://www.ojp.usdoj.gov/bja/pub/pdf/fssc02.pdf (95% of state felony convictions are obtained through guilty pleas) (last visited Jan. 22, 2008).

version of Standard 5-6.1. The Court has reasoned, for instance, that "the guiding hand of counsel . . . is essential" from the earliest stages of criminal proceedings "to protect the indigent accused against an erroneous or improper prosecution." *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970). Counsel may well "expose fatal weaknesses in the State's case that lead the magistrate to refuse to bind the accused over." *Id.* But even if she does not achieve this favorable result, counsel can at the very least "be influential . . . in making effective arguments for the accused on such matters as . . . bail." *Id.* The bail decision, in turn, determines the accused's immediate liberty, "any deprivation of [which] is a serious matter." See *Argersinger*, 407 U.S. at 41 (Burger, C.J., concurring in result); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty") (citations omitted). These considerations buttress the Court's conclusion that the Sixth Amendment right to counsel, "[w]hatever else it may mean," entitles an accused "to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (internal citations and quotation marks omitted).

Standard 5-6.1 responds to the concerns that underlie this Court's decisions and reflects the "pragmatic" view that counsel is indeed "useful[]" at early stages where defendants face "dangers" that competent counsel could easily avert. See *Patterson*,

487 U.S. at 298. That was indisputably true for petitioner here.

III. PETITIONER'S CASE ILLUSTRATES THE ADVANTAGES OF THE ABA'S APPROACH AND THE DANGERS OF THE FIFTH CIRCUIT COURT OF APPEALS' PROSECU-TORIAL INVOLVEMENT TEST.

Petitioner's odyssey highlights the very concerns that animated the ABA's adoption of Standard 5-6.1 and that underlie this Court's right-to-counsel precedents. Petitioner was arrested and jailed because of a police officer's erroneous understanding that petitioner had previously been convicted of a felony and was therefore unlawfully in possession of a firearm – a simple mistake, but precisely of the type that counsel is best suited to spot and to correct. Pet. Br. at 4. Had a competent attorney assisted petitioner at or immediately following his initial appearance, petitioner may have rapidly ceased to interest the prosecutors, the courts, and the jails, and would likely have suffered minimal loss of freedom.

But petitioner was unable to afford an attorney, and the county failed to appoint one for him. *Id.* at 4-7. As a result, he was indicted by a grand jury, rearrested, brought before a magistrate for a second time, incarcerated, transferred to a different jail because of overcrowding, and was finally cleared of the charges a full nine months after his initial appearance before a magistrate. *Id.* at 4-8. Thus, depriving petitioner of an attorney's early attention did more than cause petitioner to suffer an unnecessary and inequitable loss of liberty. It caused judges, prosecutors, law enforcement officials, jail administrators, and citizen grand jurors needlessly to expend time and resources on petitioner's processing, prosecution, and incarceration.

In no way was petitioner's need for counsel diminished by the lack of prosecutorial involvement at his initial appearance. On the contrary, the absence of a prosecutor's professional attention to the case may have made it even less likely that the initial error would be rapidly corrected. This alone counsels against adoption of the Fifth Circuit's approach in cases such as petitioner's.

The ABA's long-standing position, consistent with this Court's precedents and with the principle of equal justice under the law, suggests that petitioner should have been provided counsel, at the latest, as soon as his limited waiver of assistance had expired – that is, following his initial appearance before the magistrate. This is true regardless of whether the power of the State was exercised through a prosecutor or with a prosecutor's knowledge. Promptly honoring petitioner's request for assistance would have prevented the needless loss of individual liberty and promoted the efficient administration of justice.

CONCLUSION

The ABA respectfully submits that this Court should reverse the decision of the court of appeals.

Respectfully submitted,

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January 23, 2008